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MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No. 72-1078

EDDIE JAVOR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN THE

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

The petitioner Eddie Javor respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 25, 1972, and November 1, 1972.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto as Appendix A. No opinion was rendered by the United States District Court for the Central District of California. The Findings of Fact and Conclusions of Law and Order" of that Court appears in the Appendix hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit denying the petitioner's herein petition for habeas corpus relief pursuant to Title 28, United States Code, §2255, was entered on October 25, 1972. The judgment of the United States Court of Appeals for the Ninth Circuit denying the petitioner's herein motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure was entered on November 1, 1972. A timely petition for rehearing and suggestion for appropriateness of hearing en banc was denied on December 12, 1972 and this petition for certiorari

was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a defendant in a federal criminal case is deprived of the effective assistance of counsel at trial guaranteed him by the Sixth Amendment to the United States Constitution when his retained attorney is so physically and mentally fatigued and exhausted during a lengthy trial because of repeated bouts of heavy "partying" until the wee hours of the morning that on numerous occasions during the trial he lacked the ability to remain awake and alert and instead fell asleep and dozed throughout numerous critical portions of that trial.

2. Whether the trial court abrogated its responsibility to such a degree so as to deny and deprive the defendant of due process of law as guaranteed under the Fifth Amendment to the United States Constitution when it observed counsel sleeping during trial on numerous occasions and yet

permitted counsel to sleep instead of remedying the situation, or at the very least waking counsel and making inquiry into the situation.

3. Whether the conclusionary "finding of fact" of the trial court to the effect that "petitioner was not denied his constitutional right to effective assistance of counsel at the trial" is supported by any substantial evidence in light of the express finding of the court that "the Court observed petitioner's counsel dozing from time to time during the trial".

4. Whether there is any substantial evidence to support the finding of the trial court to the effect that while it observed counsel dozing from time to time during trial "he appeared to be alert at all times when evidence was being taken which pertained to the petitioner," in light of the previous remarks of the trial court that it was <u>when the court</u> observed counsel sleeping that it appeared to the court that the testimony did not apply to the defendant, and the totally uncontradicted testimony of respected witnesses including the Court Reporter and other attorneys that counsel

was sleeping at times other than those observed by the court and that those periods were crucial periods.

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are the Fifth and Sixth Amendments to the United States Constitution. The Fifth Amendment provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be

taken for public use, without just compensation."

The Sixth Amendment provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On June 16, 1965, petitioner was charged by indictment of the Federal Grand Jury for the Southern District of California, Central Division, with one count of violating 21 U.S.C. §174, and one count of

violating 21 U.S.C. §176(a). He pled not guilty and after a jury trial, together with two co-defendants, Rice and Toroker, charged with similar offenses in eleven and nine counts, respectively, was found guilty as charged and ultimately sentenced to five years imprisonment. Petitioner then filed a timely notice of appeal and on appeal raised issues of constitutional significance.

The Ninth Circuit on petition for rehearing remanded the case to the trial court for further proceedings (Javor v. United States (9th Cir. 1968) 403 F.2d 507) and later affirmed the judgment of the trial court (Rice v. United States (9th Cir. 1970) 435 F.2d 836). This Court then denied certiorari with Mr. Justice Douglas of the opinion that certiorari should be granted. (Javor v. United States (1971) ___ U.S. ___, 30 L.Ed.2d 107).

On December 17, 1971, petitioner Javor filed his petition for relief at issue below pursuant to 28 U.S.C. §2255 in the Federal District Court, the Honorable Jesse W. Curtis, Judge Presiding. The petitioner alleged, in pertinent part, that he was

denied his constitutional right to due process and effective assistance of counsel at trial, asserting in pertinent part that his trial attorney, Samuel Brody, Esq., was so physically and mentally fatigued and exhausted at trial that he could not effectively follow the proceedings and lacked sufficient facilities to remain alert or even awake during said trial and did in fact fall asleep and was unconscious on numerous critical occasions during highly important periods of said trial. These same allegations were made in the consolidated motions for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, filed with the same Court on February 3, 1972.

In response to the moving papers, the United States of America, the respondent herein, filed its opposition to both motions on January 25, 1970. The position of the Government was, in pertinent part, that "If a defense attorney were asleep during the course of a trial, it is beyond comprehension that this [Federal District] Court would have permitted the trial to continue for one second." The issues being

joined, a hearing on both motions was held on February 3, 1972. Because of the fantastic episode there related, an episode which the office of the United States Attorney itself characterized as "beyond comprehension", the evidence adduced at that hearing is set forth below in some detail.

Mrs. Florence Garcia, the Court Reporter at the trial below, took testimony on the 9th, 10th and 12th of November, 1965, during which days the Government presented its case in chief. Mrs. Garcia testified that during this period Mr. Brody, petitioner's trial counsel, "seemed to be dozing at times." Sometimes "he just reflectively would close his eyes as sometimes people are wont to do" "but other times it was deeper than that." "Sometimes his eyes -- well, he was fighting. You could see he was trying to keep his eyes open. They would close. And I remember a couple of times his arms slipped off the arm of his chair. And one time I think Mr. Javor poked him and it startled him and he opened his eyes and sat up straight." That same day she noticed his head falling to his chest. Her opinion was that, "Mr. Brody was in

fact falling asleep or he lost control of himself."

Mrs. Garcia did not remember if Mr. Brody seemed to be sleepy all three days she reported. She knew "that it was more than just one day, but [didn't] know if it was two or three. Maybe it was only two. But [she was] sure it was more than one." She didn't remember Brody doing much of anything; she just remembered "seeing him sitting there dozing at times." When asked if Mr. Brody appeared to be so sleepy that he did not know what was going on at all during the trial, she responded, "Not all the time, no." She didn't feel it was necessary to bring that to the attention of the trial judge because she thought that "the judge would know what was going on in his own court room."

Erwin Sobel, an attorney representing one of the three defendants at trial, testified that he observed Mr. Brody in such a position that he could have been sleeping possibly on one occasion. His head was bent down towards his chest and he was supporting his head with his hands. Mr. Sobel believed his (Mr. Brody's) eyes

were closed, but could not testify as to whether he was sleeping or not. On cross-examination he stated that he did not see Mr. Brody actually sleeping that he could tell. Mr. Brody appeared to be alert ninety-nine percent of the time during the trial.

It was stipulated that if called as a witness, Mr. Basil Lambrose, the third defense attorney, would testify, "That during the course of the trial he observed Mr. Brody sleeping; that on two occasions he awoke Mr. Brody and called his attention to the fact that a trial was going on in the Federal District Court."

Mr. Javor, the defendant, testified by affidavit that, "During the course of the trial, Mr. Brody appeared to be so physically and mentally exhausted that on frequent occasions he would place his head in his hands and to go to sleep. These sleeping episodes would occur during the taking of evidence in the trial." "Mr. Brody was so exhausted that he could not effectively follow the proceedings during the trial of this case," "but Mr. Brody declined to [report to the court] on the grounds that it would be professionally injurious to him

and that [appellant] had a 'sure winner' on appeal."

Mr. Javor further testified that on at least six occasions on at least two or three days, some at the beginning of trial and some close to the end, Mr. Brody would place his head in his hands and go to sleep. Mr. Javor had to wake him up. At first he just kicked him underneath the table and startled him. Then it got to a point where he just kept falling back to sleep. Mr. Javor repeatedly attempted to keep Mr. Brody awake, poking him with his hand or elbow. He then asked Mr. Sobel to try to keep Mr. Brody awake. At one point Mr. Sobel kicked Mr. Brody and said, "Sam, wake up, the judge is looking at you." Mr. Brody told Mr. Javor that he was trying his best to stay awake during the trial.

Mr. Marshall Lurie, a very good friend of Mr. Brody, testified that he went out socially with Mr. Brody at night during the trial of Mr. Javor. They would stay out quite late -- until the wee hours of the morning -- partying, and then go back to Mr. Lurie's nightclub, "and then go from there. So it was all night. Some nights

we just stayed out. Then he used to go the health club every morning." Although Mr. Brody was married, they were accompanied by different girls. Mr. Brody had an apartment other than his house and sometimes they wound up there with the girls. Some nights they just spent the night wherever they were. When asked when he was out with Mr. Brody until early in the morning if he was asleep or awake after that time, Mr. Lurie responded, "Well, I don't know how he made it. You know, just through the day -- because I used to go home and go to sleep and he used to go to court."

The record of the criminal trial proceedings showed that the main bulk of the prosecution's case was presented during the first three days of trial.

On the first day of trial, November 9, 1965, Mr. Mueron, a chemist, testified as to the contents of certain narcotic exhibits, some of which were alleged to have been supplied by Mr. Javor. Later that day, Agent Salmi testified to purchases of certain specifically identified quantities of heroin later alleged to have been obtained through Mr. Javor. The second

day of trial, November 10, 1965, John Tony Cagle testified that Javor had him bring in from Mexico one of the heroin exhibits. Mr. Cagle was the most damaging witness to Javor. That same day, Agent Sherman testified that he overheard a critical and highly incriminating telephone conversation between co-defendants Javor and Rice. On the third day of trial, there was also substantial incriminating evidence as to Javor.

At the conclusion of evidence at the §2255 hearing and after counsel had restated petitioner's position, the Court then made the following comments appropriate to the issues here in controversy:

> "I noticed counsel dozing at times. In fact, I think I saw Mr. Javor one time kick him and wake him up. In fact, I think on a second occasion, I saw somebody poke him. And I was concerned about it, except I at that time realized that that which was then under discussion and that to which the testimony then related had no bearing at all upon Javor. And I took it that Mr. Brody was bored. And I must confess I felt certain

sympathy for him because I was, too, at that point. We had gone on for a long time with a lot of evidence which was intended to impress the jury.

"And I watched Mr. Brody with the thought in mind that I wondered if he was just bored and if he were awake at the appropriate time when those questions involving Mr. Javor came up. And I was not concerned at the time. I felt that he was aware, was following the trial, that he spoke only as to those matters which related to his client."

The Court then denied the motions and subsequently signed the following "Finding of Facts and Conclusions of Law and Order":

"The petitioner was not denied his constitutional right to effective counsel at the trial. Petitioner was tried with co-defendants, the bulk of the testimony relating to the activities of the co-defendants, and although the Court observed petitioner's counsel dozing from time to time during the trial, he

appeared to be alert at all times when evidence was being taken which pertained to the petitioner."

On appeal to the United States Court of Appeal for the Ninth Circuit the identical issues raised within the instant petition were raised therein. The opinion of the Court affirming the judgment of the Court below was as follows:

"Petitioner appeals the denial of habeas corpus relief under 28 U.S.C. §2255. He contended that his retained attorney was incompetent, and that he had been denied the effective assistance of counsel at his trial.

"The critical factual determination on the competence of counsel was made after a comprehensive hearing in which the district court gave careful consideration to every point urged by petitioner. The findings against the petitioner are supported by substantial evidence."

Petitioner has been released on bail

continuously from the time of the conclusion of the first trial until present.

REASONS FOR GRANTING THE WRIT

The Federal District Court, both at trial, when it observed counsel sleeping yet failed to take any action, and at the hearing on the §2255 motion, when it found that petitioner was neither deprived of due process nor the effective assistance of counsel committed obvious and exceptional error of such magnitude as to shock the conscience and constitute a gross miscarriage of justice, equivalent itself of a denial of due process. Said determination of the §2255 Court is in conflict in principle, in this case of first impression, with every decision extant regarding the elements of due process and the right to effective assistance of counsel, and was so great a departure from the accepted and usual course of judicial proceedings, as was the action of the Court of Appeal itself in sanctioning that misconduct, as to call for the exercise of this Court's power of supervision. Action by this Honorable Court thus is

necessary not only to insure the proper functioning of the federal judiciary, but further to rectify a manifest injustice which blemishes the reputation of the federal bar and bench, creates at least the appearance of evil, and actively involves both courts below in the participation in and perpetration of a farce and sham trial.

DISCUSSION

It is too well established to require citation that an appellate court has the duty to independently review the record to determine if the rulings below are supported by substantial evidence. The Court of Appeals below, however, has apparently abrogated that duty, for its ruling that the "factual determination" of the court below, to the effect that appellant was not denied his constitutional right to effective assistance of counsel, was supported by substantial evidence is belied by a record which shows without contradiction that trial counsel was in such a state of exhaustion that he repeatedly slept throughout crucial periods of the trial.

Stated succinctly, the case here presented is a simple one. During appellant's criminal trial, his counsel engaged in all night sessions of heavy partying which would end in the morning when counsel's companion would go home and go to sleep while counsel would go to court. Apparently the only sleep he obtained was during the trial itself. All of the attorneys, the court reporter, and the trial court itself noticed that counsel was asleep. Some of the sleeping episodes occurred during the first three days of trial during which time the Government presented its case in chief against all defendants. The other attorneys and Mr. Javor himself would hit or kick or nudge counsel to keep him awake, but were unsuccessful. While counsel would attempt to remain awake and fight not to sleep, ultimately his eyes would close and he would return to slumber. His head would drop to his chest and his arm would slip off the chair. Occasionally other counsel or Mr. Javor would poke or startle Mr. Brody awake but eventually this entire process would repeat itself. It was only some of the time, however, that when he was not actually asleep, that he appeared

to be so sleepy as to not know what was going on at all. No one thought, however, to bring these events to the attention of the trial court because, it was believed, the judge would know what was going on in his own courtroom. Nor would counsel profess his own inability to the Court because counsel, in his lucid moments was of the belief that it would injure him professionally and that it was of no significance as appellant had a sure winner on appeal. It did turn out, however, that the judge did know what was going on in his own courtroom. The Court itself stated that it had observed all of the above described events -- kicking, poking, sleeping -- and while the Court was concerned about it, it was of the opinion that the testimony taking place at the time the Court observed counsel's slumber was, again in the opinion of the Court, that which had no bearing at all upon Appellant. And, in any event, the Court believed that Mr. Brody was bored, and it felt sympathy for counsel, because it too was bored with the trial. The only thing that was happening was that a long time had been spent with a lot of evidence which was intended to impress the jury.

On this record we think it clear that the ultimate determination of both the §2255 Court, which denied relief, and the Court of Appeals, which affirmed that denial, to the effect that appellant was neither deprived of due process of law nor denied the effective assistance of counsel at trial, constituted plain error of the highest magnitude.

Here the record clearly established, without any shadow of contradiction and the §2255 Court specifically found, that: (1) petitioner's trial counsel was asleep on various occasions during the giving of testimony and, (2) said counsel was observed sleeping on several of these occasions by the trial court which took no action in response thereto. Surely there can be no doubt that these events in themselves constituted error. Counsel was as effectively absent during these periods of sleep at trial as if he were in an intoxicated stuper or had purposely absented himself from the courtroom. Yet if counsel had exited the trial proclaiming extreme fatigue and boredom, or had been so intoxicated as to be unconscious, no one would seriously argue

that trial should continue in his absence, actual or metaphysical. Likewise, the most basic demands of due process, if they did not require the Court to take any steps to remedy the situation, as we assert, mandated at least that the trial Court, upon observation of these episodes, make, at the very minimum, a rudimentary inquiry into counsel's ability to proceed. Failure to do so, it is submitted, is also error of the most elementary nature.

Given these postulates, it is readily apparent that the decisions of both courts below cannot stand. Inherent in both is the concept that while it was legal error for the counsel to sleep and that while it was legal error for the trial court to fail to take any action, the bouts of sleeping occurred during periods of testimony which in the opinion of Judge Curtis were unrelated to petitioner and thus no prejudice is shown in the record to have resulted therefrom and thus the aforementioned legal errors did not rise to the level of denial of due process or effective assistance of counsel. For the reasons stated below, however, this rationale is both factually

and legally deficient.

It should first be recognized that the only statements in the record which attempt to equate any period of sleep by counsel with periods of time immaterial to Mr. Javor were not testimony of witnesses given under oath, but the remarks of Judge Curtis at the end of the §2255 hearing. And it cannot here be overemphasized that those statements were specifically limited to the periods of time when Judge Curtis himself observed counsel's slumber. Thus the record is clear that all of the statements as to the periods when appellant's trial counsel was sleeping were cumulative rather than exclusive. That is, each person, including the trial judge, spoke as to the amount of time and the exact occasion when that person observed counsel sleeping. No one purported to state that the observations of the others were inaccurate or that the period and time in which that person observed counsel sleeping was the only time that counsel did in fact sleep. Thus, there is no evidence in the record which in any way would support a finding that trial counsel's sleep occurred only during

periods unimportant to Petitioner.

This factual clarification of the record, however, presents but one aspect of the erroneous rationale employed below. Even were we to assume that any portion of the trial below could be unimportant with respect to the defendant, a position which it is asserted is legally insupportable, and which we accept here only for the sake of argument, the concept which both courts below failed to grasp was that petitioner's complaint was addressed to the deprivation which occurred not merely just during the periods of time during the duration of which counsel was in an actual state of slumber, but also those far greater periods during which counsel would be attempting to remain awake. The record below graphically illustrates that even during those periods in which counsel was awake, he was not in any shape to function as a defense attorney. Counsel here was clearly in no position to even drive a car, yet both courts below apparently found that it was proper to permit him to represent the appellant, charged with a most serious offense, in a court of law. We think it clear that that

is not and should not be the law. If appellant were too mentally exhausted to win the battle to stay awake, how can it be argued that he was sufficiently alert to constitute the constitutionally required effective counsel.

In the final analysis however, the basic fault of the position implicit in the determination of both courts below is that they are based upon a concept which is fundamentally outmoded and legally erroneous. The essence of that position is simply that petitioner cannot point to prejudice stemming from those undefined periods of time during which it was established that trial counsel was asleep. This argument, however, is merely a variation on a theme -- that a defendant who was denied his right to counsel must nevertheless affirmatively show that he was prejudiced thereby -- which has been constantly proposed and constantly rejected.

This Honorable Court especially has persistently refused to search the record of a trial for prejudice once the right to counsel is shown to have been violated. (Glasser v. United States (1942) 315 U.S.

60, 70, 76; Reynolds v. Cochran (1961) 365 U.S. 525, 531; Hamilton v. Alabama (1962) 368 U.S. 52; White v. Maryland (1963) 373 U.S. 59; United States v. Wade (1967) 388 U.S. 218, 236; Chapman v. California (1967) 386 U.S. 18, 23.) Perhaps the best statement of this concept is found in Glasser wherein this Court held that: "...The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Likewise, in respect to the assertion that the trial Court's failure to act ultimately resulted in a denial of due process, one further element here also needs further elaboration. Case law is inextricably clear that the sharpest observations and efforts of any court on a defendant's behalf is a totally inadequate substitute for the right to counsel. (Douglas v. California (1963) 372 U.S. 353.) The Douglas court, at page 358, characterized such a procedure "where the record is unclear or the errors are hidden" as a "meaningless ritual." Likewise in Dennis v.

United States (1966) 384 U.S. 855, 874-5, this Court in a similar context stated: "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge." Thus, while Judge Curtis may have been of the firmest conviction that his actions could safeguard defendant's rights, that simply is not the state of the law nor is it consistent with the constitutionally protected rights to counsel and due process of law. Counsel here was entitled to be represented by a vigorous advocate, a position defense counsel abdicated while sleeping, and which the court was inherently unable to fulfill.

CONCLUSION

A mere recital here of the errors below however, fails to do full justice to the dramatic effect of the terrible events under review which warrant the attention of this Court.

In its response to petitioner's motion, the Government answered that "If a defense attorney were asleep during the course of a trial, it is beyond comprehension that this [the trial court sitting on the §2255 motion] court would have permitted the trial to continue for one second." That evaluation was, of course, erroneous for the trial court made it clear that it, in fact, had observed counsel's slumber, but had permitted the trial to proceed. What is beyond comprehension, however, is that neither the trial court nor the §2255 court nor the Court of Appeals would rectify this grave miscarriage of justice and set its own house in order. Instead, these Courts endorsed, sub silento, the proposition that counsel, who because of sheer physical exhaustion is so mentally fatigued during the course of trial that he cannot help but fall asleep, nevertheless meets the standards of the District Courts for the Southern District of California and the Court of Appeals for the Ninth Circuit for effective aid of counsel and that a failure to act by a trial court which observes that conduct does not deprive a defendant of due process of law.

These rulings both excuse and further the most shameful type of conduct by all of the attorneys and all of the Courts below. This record vividly shows a breach of ethics so enormous that words pale before the actual experience. It further discloses a cavalier disregard of the most basic rights of a defendant by every officer of the Court, and the Court itself. This is a case where counsel was in fact so fatigued that he slept and was therefore unconscious during trial. No one present had the fortitude to bring that state of affairs to the attention of the trial Court, yet that Court itself observed counsel's sleep. Astonishingly enough, however, it not only took no action to insure the defendant a fair trial, but instead felt a certain degree of sympathy for the attorney because it believed that counsel was perhaps bored and it too was bored with the proceedings. The defendant, of course, had no time to be bored, for the duty to keep counsel awake and alert fell to him by default. The record is silent as to whether anyone felt sympathy for the defendant.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

BURTON MARKS
RICHARD G. SHERMAN
LARRY L. SCISSORS

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDDIE JAVOR, Appellant, v. UNITED STATES OF AMERICA, Appellee.	))))))	No. 72-1502

Appeal from the United States District Court for the Central District of California.

Before: ELY and GOODWIN, Circuit Judges, and ENRIGHT, District Judge.*

PER CURIAM:

Petitioner appeals the denial of habeas corpus relief under 28 U.S.C. § 2255. He contended that his retained attorney was incompetent, and that he had been denied the effective assistance of counsel at his trial.

---

*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

The critical factual determination on the competence of counsel was made after a comprehensive hearing in which the district court gave careful consideration to every point urged by petitioner. The findings against the petitioner are supported by substantial evidence.

Affirmed.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDDIE JAVOR, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	))No. 71-2940-JWC))FINDINGS OF FACT)AND CONCLUSIONS)OF LAW AND ORDER))

After hearing on petitioner's motion under Title 28 U.S.C. § 2255, the Court finds that

The petitioner was not denied his constitutional right to effective counsel at the trial. Petitioner was tried with two co-defendants, the bulk of the testimony relating to the activities of the co-defendants, and although the Court observed petitioner's counsel dozing from time to time during the trial, he appeared to be alert at all times when evidence was being taken which pertained to the petitioner.

Althouth it now appears that petitioner's attorney failed to make certain objections which might have benefited the petitioner, there is no showing here which compels this Court to conclude that such omissions were other than a deliberate, strategic judgment.

THE COURT FURTHER FINDS that the evidence before the Court at the time of the trial was sufficient for the Court to rule and this Court would have ruled that the arrest was made upon probable cause and that the search and seizure incident thereto was lawful.

THE COURT FURTHER FINDS that the fact that the Government called as a witness a narcotic agent who was subsequently convicted of perjury does not in any way invalidate the conviction since that officer's testimony was fully corroborated by another officer.

On these findings the Court concludes that petitioner's motion is without merit and is, therefore, denied.

The clerk is ordered to serve a copy of this order, by United States mail, upon all parties to this cause.

DATED: February 8, 1972.

Jesse W. Curtis

JESSE W. CURTIS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDDIE JAVOR, Appellant, v. UNITED STATES OF AMERICA, Appellee.	)	No. 72-1502
UNITED STATES OF AMERICA, Appellee, v. EDDIE JAVOR, Appellant.	)	No. 72-1503

Appeals from the United States District Court for the Central District of California

Before: ELY and GOODWIN, Circuit Judges, and ENRIGHT, District Judge.*

ORDER

The panel as constituted in the above cases has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

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*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1078

EDDIE JAVOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question raised by petitioner on this motion for collateral relief is whether he was denied effective assistance of counsel and due process of law because his retained attorney was observed apparently sleeping at times during the trial.

After a jury trial with others in the United States District Court for the Central District of California, petitioner was convicted on two counts of bringing narcotic drugs into the United States contrary to law, in violation of 21 U.S.C. (1964 ed.) 174. He was sentenced to con-

current terms of five years' imprisonment.[1] The conviction was affirmed, 435 F. 2d 836, and this Court denied certiorari, 404 U.S. 864.[2]

Petitioner then instituted the present action to vacate sentence under 28 U.S.C. 2255, claiming that he had been denied effective assistance of counsel because his retained attorney had been observed apparently sleeping at times during the trial.[3] After an evidentiary hearing, the district court denied petitioner's motion, finding (Pet. App. B-1) that "petitioner was not denied his constitutional right to effective [assistance of] counsel at trial." The court of appeals affirmed *per curiam* (Pet. App. A).

The question whether petitioner's retained counsel failed to provide effective assistance due to physical weariness during trial is primarily one of fact to be determined by the district court. The trial judge observed counsel's representation of petitioner at trial and, after the present motion was filed, conducted a comprehensive hearing on the issue of counsel's physical and mental capacity at the time of trial; the trial judge's conclusion that petitioner in fact received adequate representation from his counsel was based on a close acquaintance with the facts of this

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[1] His original sentence of concurrent terms of seven years' imprisonment was subsequently reduced to five years pursuant to Rule 35, Fed.R.Crim.P.

[2] Petitioner's conviction was initially reversed by the court of appeals, but after rehearing was remanded to the district court for fact findings on the issue of the voluntariness of confessions by his co-defendants. 403 F. 2d 507. After the evidentiary hearing on remand, the district court resolved that issue in favor of the government. The court of appeals then affirmed the convictions. 435 F. 2d 836.

[3] He also raised claims with respect to search and seizure and the testimony of a government agent. These claims have been abandoned.

case and should not be disturbed if supported by substantial evidence. The court of appeals, in affirming, expressly determined that the district court's findings were supported by substantial evidence. This essentially factual question warrants no further review.

Moreover, petitioner made no objection to the effectiveness of his retained counsel at trial, even though he now alleges that his counsel's physical weariness was apparent to him at that time. Having determined to continue with retained counsel, petitioner should not now be heard to complain. As the Sixth Circuit stated in *Loukas* v. *Johnson*, 453 F. 2d 407, 408:

> Ordinarily, a defendant who retains counsel of his own selection is responsible if that counsel does not faithfully serve his interest. Any other rule would put a premium upon pretended incompetence of counsel; for, if the rule were otherwise, a lawyer with a desperate case would have only to neglect it in order to insure reversal or vacation of the conviction. * * *

Moreover, petitioner here has pointed to no specific instance of prejudice.[4]

There is no merit to the claim that petitioner was denied due process because the trial judge did not take any affirmative action when he observed petitioner's counsel apparently sleeping. There were three co-defendants at trial and much of the evidence had no relevance to petitioner; the district court expressly stated that "petitioner's

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[4] In the lower courts petitioner cited as instances of the ineffective assistance of his trial counsel the failure to move for a pretrial severance, failure to make a pretrial motion to suppress, and the untimely filing of a motion for new trial. However, the trial court found that the record did not reveal ineffective assistance of counsel on these issues or on the entire record.

counsel * * * appeared to be alert at all times when evidence was being taken which pertained to petitioner" (Pet. App. B-1).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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